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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of HELGA BRASCH SIMON, Deceased.	B209553 (Los Angeles County Super. Ct. No. BP070524)
DAVID SIMON, Plaintiff and Appellant, v. ROBERT EROEN et al., Objectors and Respondents.	

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Law Office of Christie Gaumer and Christie Gaumer for Petitioner and Appellant.

Meyers & McConnell, John William McConnell III, Berta Angelina Blen and Chaim Jacob Woolf for Objectors and Respondents.

I. INTRODUCTION

Plaintiff, David Simon, appeals from an April 17, 2008 order granting attorney fees to objectors and interested parties, Robert Eroen, Jill Rosenthal Eroen, and the law firm of Eroen & Eroen (the firm). The objectors represented plaintiff in a prior action involving his mother's estate. The prior action was brought by plaintiff against Ernst and Adelle Simon. Mr. Simon is plaintiff's father. Ms. Simon is Mr. Simon's second wife. The prior action was settled. The settlement agreement contained an attorney fees clause. Plaintiff then brought a legal malpractice action against the objectors arising out of the prior action. Additionally, plaintiff filed the present proceeding to probate a newly discovered will purportedly executed by his mother. The parties stipulated to stay the legal malpractice action pending the resolution of the present proceeding. The stipulation gave the objectors standing in the present action. This included standing to assert any claim that could have been raised by Mr. Simon. Later, the objectors successfully argued the settlement agreement, which contained the attorney fees clause, barred the present action to probate the newly discovered will. The trial court awarded the objectors attorney fees under the settlement agreement and plaintiff appealed. We affirm the order.

II. BACKGROUND

As noted, in a prior action, plaintiff sued the Simons. Plaintiff sued to recover property in his mother's estate. The objectors represented plaintiff in that prior action. A November 3, 1998 settlement was reached between plaintiff, Mr. Simon, and Ms. Simon (the settlement agreement). Pursuant to the settlement agreement, plaintiff resolved any claim he had with respect to his mother's estate. The settlement agreement included an attorney fees clause, "If it becomes necessary for any party hereto to retain an attorney to enforce the terms of this Agreement, against any party who has breached it, and/or is in default, the court in any action, or proceeding for the breach of or to enforce this

Agreement, shall award the prevailing party reasonable attorneys' fees and legal expenses."

In the present action—instituted after the settlement agreement was signed—plaintiff filed, on October 4, 2005, a petition to probate a newly discovered will purportedly executed by his mother. At the time plaintiff sought to probate the newly discovered will, he also had pending a legal malpractice action against the objectors. (*Simon v. Eroen* (Super. Ct. L.A. County, May 7, 2003, No. BC295297.) Plaintiff alleged the objectors committed malpractice when they represented him in the action resulting in the settlement agreement. On August 5, 2005, the legal malpractice action was stayed pending the outcome of the present probate action with respect to the newly discovered will. The parties entered into a court-approved stipulation staying the legal malpractice action (the stipulation). The stipulation provides in part: "The Parties stipulate and agree that Robert Eroen and Jill Rosenthal [Eroen] are interested parties with respect to any and all issues relating to the [newly discovered] Will and its admission to probate in the Probate Court, and have and will continue to have standing to file Objections, Statements of Interest, or any other pleadings with respect to any proceedings relating to the [newly discovered] Will including, without limitation, claims that were or could have been raised by Ernst Simon. Plaintiff David Simon further stipulates that any such pleadings so filed in such probate action shall be considered by the Probate Court with the same weight the Court would accord the interest of a beneficiary under the [newly discovered] will."

The objectors moved for summary judgment in the present action on grounds the petition to probate the newly discovered will was barred by the settlement agreement. On July 12, 2006, the probate court granted the objectors' summary judgment motion. On September 7, 2006, plaintiff filed a notice of appeal from the summary judgment. We affirmed the summary judgment. (*Estate of Helga Brasch Simon* (July 18, 2007, B193611) [nonpub. opn.].) Plaintiff's review petition in our Supreme Court was denied on October 10, 2007. (*Estate of Helga Brasch Simon* (review denied Oct. 10, 2007, S155787).) The remittitur issued on November 2, 2007.

Forty days after the remittitur issued, on December 12, 2007, the objectors filed a motion to recover $51,205.36 in attorney fees and costs as the prevailing parties. The objectors sought to recover fees incurred in the probate court and on appeal. (Alternatively, the objectors requested $25,240.65 in costs and fees incurred after they issued a statutory offer to compromise.) Plaintiff opposed the attorney fees motion. On April 17, 2008, the probate court awarded the objectors $51,205.36 in costs and attorney fees. Plaintiff unsuccessfully sought reconsideration. This appeal followed.

III. DISCUSSION

A. Timeliness

Plaintiff briefly contends the objectors' attorney fees motion was untimely because it was not filed within 60 days after notice of entry of summary judgment as required by California Rules of Court, rule 3.1702(b)(1). (All further references to a rule are to the California Rules of Court.) The time provisions in rule 3.1702(b)(1) are mandatory, but not jurisdictional. (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 426; *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1725-1728.) This timeliness issue was not raised in the probate court. As a result it has been forfeited. (See *Ford Motor Credit Co. v. Hunsberger* (2008) 163 Cal.App.4th 1526, 1531; *Premier Medical Management Systems, Inc.* (2008) 163 Cal.App.4th 550, 564; *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 928-929.)

Even if not so waived, we reject petitioner's argument. First, the argument is not supported by adequate citations to legal authority or to the record. It is premised solely on a citation to rule 3.1702(b)(1). Consequently, under well established authority, the issue does not warrant consideration. (E.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2; *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; *Building etc. Assn. v. Richardson* (1936) 6 Cal.2d 90, 102; *Estate of Randal* (1924) 194 Cal. 725, 728-729; *Berger v. California Ins. Guarantee*

Assn. (2005) 128 Cal.App.4th 989, 1007; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1245-1246.) Second, the Court of Appeal has held rule 3.1702 is inapplicable to claims for attorney fees in probate court litigation as opposed to civil actions generally. (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97-99 [former rule 870.2]; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 301, p. 897; see *Sanabria v. Embrey, supra,* 92 Cal.App.4th at pp. 426-429). Plaintiff neither cites nor discusses *Hollaway*. Third, the objectors sought attorney fees incurred both in connection with the summary judgment *and on appeal.* The request for attorney fees incurred on appeal from the summary judgment could not have been filed within 60 days after notice of entry of that judgment. The request for attorney fees incurred on appeal was timely filed in the trial court within 40 days after the remittitur issued. (Rules 3.1702(c)(1), 8.278(c)(1); see *In re Marriage of Freeman* (2005) 132 Cal.App.4th 1, 7-9; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 14:122.8, p. 14-33 (rev. #1, 2008); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 982, p. 1028.)

B. Legal Basis

Plaintiff argues there was no legal basis for an attorney fees award. We independently review the legal basis for an attorney fees award as a question of law. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 903; *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 340; *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 604.) As a general rule, applicable in probate proceedings, attorney fees are recoverable only as allowed by statute or express contract. (*Estate of Marre* (1941) 18 Cal.2d 191, 192; *Estate of Gerber* (1977) 73 Cal.App.3d 96, 117; *Estate of Harvey* (1964) 224 Cal.App.2d 555, 561-562; *Estate of Bevelle* (1947) 81 Cal.App.2d 720, 722.) This case does not involve an attorney fee award for services to the estate. (*Estate of Trynin* (1989) 49 Cal.3d 868, 873-874; *Estate of Johnston* (1956) 47 Cal.2d 265, 272-273.) The present fee request was premised on an attorney fee clause in a settlement agreement.

We agree with the objectors that the settlement agreement in the probate action, together with the stipulation in the legal malpractice proceeding, supported the attorney fees award. Both the stipulation and the settlement agreement are forms of contract and must be analyzed according to the general rules of contract interpretation. (*In re Marriage of Gowan* (1997) 54 Cal.App.4th 80, 87 [stipulation]; cf. *People v. Segura* (2008) 44 Cal.4th 921, 930 [negotiated plea agreement]; *Efund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1321 [strategic relationship agreement].) Our Supreme Court has held: "'"'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)' [Citations.]"'" (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *People v. Shelton* (2006) 37 Cal.4th 759, 767 ["If contractual language is clear and explicit, it governs"]; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [same].) When, as here, there is no conflicting extrinsic evidence on point, we independently determine the meaning of the contractual language. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 64, 650-651; *Mission Valley East, Inc. v. County of Kern* (1981) 120 Cal.App.3d 89, 99.)

The stipulation in the legal malpractice action gave the objectors standing in this probate action to file any pleadings with respect to the newly discovered will and to assert any claim that could have been raised by Mr. Simon. The stipulation executed by the Eroens and plaintiff staying the legal malpractice lawsuit expressly states in relevant part, "The Parties stipulate and agree that [the Ereons] . . . have standing to file . . . claims that . . . could have been raised by Ernst Simon." In litigation to enforce the settlement agreement, Mr. Simon could have asserted an attorney fee claim if he were the

prevailing party. Here, the objectors enforced the settlement agreement by successfully asserting it as a bar to plaintiff's attempt to probate a newly discovered will. The order granting summary judgment enforced the settlement agreement. Hence, under the plain terms of the stipulation and the settlement agreement, the objectors were entitled to recover reasonable attorney fees as the prevailing parties on summary judgment and on appeal therefrom. Plaintiff has not argued the language of the attorney fees clause in the settlement agreement is insufficiently broad to reach the circumstances of this case. Plaintiff also raises no argument it was error to award attorney fees to the firm on grounds the stipulation afforded standing only to the Eroens. Thus, any such arguments have been forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Johnston v. Board of Supervisors of Marin County* (1947) 31 Cal.2d 66, 70 overruled on another point in *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 139.)

C. Excessiveness

Plaintiff contends the objectors' attorney fees request was in an excessive amount. Plaintiff has not supported his argument with adequate citations to legal authority and to the record. As a result, the argument has been forfeited. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at p. 366, fn. 2; *People v. Barnett, supra*, 17 Cal.4th at p. 1107, fn. 37; *Building etc. Assn. v. Richardson, supra,* 6 Cal.2d at p. 102; *Estate of Randal, supra*, 194 Cal. at pp. 728-729; *Berger v. California Ins. Guarantee Assn., supra,* 128 Cal.App.4th at p. 1007; *Nwosu v. Uba, supra,* 122 Cal.App.4th at pp. 1245-1246.) Even if not waived, the Supreme Court has held: "'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court . . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial

court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-624.)" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) Plaintiff has not established that the probate court abused its discretion. (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1096; *Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1106-1107.)

IV. DISPOSITION

The April 17, 2008 order granting attorney fees is affirmed. Objectors and interested parties, Robert Eroen, Jill Rosenthal Eroen, and the law firm of Eroen & Eroen, are to recover their costs, including attorney fees, on appeal from plaintiff, David Simon.

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TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.